No. 92-357

In the Supreme Court of the United States

OCTOBER TERM, 1992

RUTH O. SHAW, ET AL., APPELLANTS

v.

STUART M. GERSON, Acting Attorney General, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

The Court noted probable jurisdiction and directed that argument would be limited to the following question, which the Court directed all parties to brief:

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-60a) is reported at 808 F. Supp. 461.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 61a-63a) was entered on April 27, 1992. A notice of appeal was filed on May 27, 1992. J.S. App. 64a-66a. The jurisdictional statement was filed on August 25, 1992, and probable jurisdiction was noted on December 7, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and Section 1 of the Fifteenth Amendment to the Constitution of the United States are set forth at pages 3-4 of appellants' opening brief. The relevant provisions of the Voting Rights Act of 1965, 42 U.S.C. 1973, 1973c, are set forth at App., *infra*, 1a-3a.

STATEMENT

1. Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, provides that when a State or political subdivision with a history of voting discrimination, as defined in 42 U.S.C. 1973b(b) (a "covered jurisdiction"), seeks to alter its "standard[s], practice[s], or procedure[s] with respect to voting," it must obtain authorization to do so in one of two ways. It must either obtain a declaratory judgment from the United States District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c, or it must obtain administrative preclearance from the Attorney General.

When a covered jurisdiction submits a proposed change in electoral practices or procedures to the Attorney General for administrative preclearance, the Attorney General may interpose an objection within 60 days, in which case the covered jurisdiction is precluded from implementing the change unless it seeks and obtains declaratory relief in the United States District Court for the District of Columbia. 42 U.S.C. 1973c.[1] If the Attorney General determines not to interpose an objection, the covered jurisdiction may then implement the proposed change, although the Attorney General's failure to object does not bar a subsequent action to enjoin enforcement of the practice or procedure. *Ibid.* This Court has held that a legislative redistricting plan constitutes a change in a "practice[] or procedure with respect to voting" within the meaning of Section 5. *McDaniel* v. *Sanchez*, 452 U.S. 130, 137-138 (1981); *Beer* v. *United States*, 425 U.S. 130, 133 (1976); see also *Wise* v. *Lipscomb*, 437 U.S. 535, 542 (1978) (opinion of White, J.); accord 28 C.F.R. 51.13(e).

2. The State of North Carolina is entitled to 12 seats in the United States House of Representatives. J.S. App. 2a. In July 1991, the North Carolina General Assembly enacted a redistricting plan for the State's 12 congressional seats. *Ibid.* That plan included one district in which blacks constituted a majority of the voting age population (VAP). *Ibid.*

Because 40 of North Carolina's 100 counties are covered jurisdictions for purposes of Section 5 of the Voting Rights Act, the State submitted its redistricting plan to the Attorney General for administrative preclearance under Section 5. J.S. App. 3a. On December 18, 1991, the Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, interposed an objection to the plan. *Ibid.*; see App., *infra*, 4a-12a.

The Attorney General's objection letter began by noting that the district lines in the south-central to

[1] A jurisdiction may also request that the Attorney General reconsider the decision to object to a proposed change. 28 C.F.R. 51.45.

southeastern part of the State "appear[ed] to minimize minority voting strength given the significant minority population in this area of the state." App., *infra*, 10a; J.S. App. 3a. Specifically, it appeared that the State "chose not to give effect to black and Native American voting strength in this area," even though "boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state." App., *infra*, 10a; J.S. App. 3a-4a.

The letter also noted that the State "was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina." App., *infra*, 10a; J.S. App. 4a. It pointed out that the Department of Justice had reviewed several alternative plans providing for a second majority-minority district in the southern part of the State, at least one of which had been presented to the General Assembly. App., *infra*, 10a; J.S. App. 4a. The letter stated that the alternative plans, and other variations identified in the Department's analysis, "appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons." App., *infra*, 10a-11a; J.S. App. 4a.

In response to the Attorney General's objection, the State's General Assembly enacted a revised redistricting plan in January 1992. J.S. App. 4a. That plan includes two districts in which blacks constitute a VAP majority. *Ibid.* The second of those districts,

District 12, consists of a narrow band of urban population concentrations along Interstate 85 between Durham and Gastonia. *Id.* at 4a-5a.[2]

District 12 is "some 160 miles long" and is "sometimes no wider than" Interstate 85 itself. J.S. App. 4a-5a. Because of the configuration of District 12, "many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts." *Id.* at 5a. In deciding to create this district, the district court explained, "the Democratically controlled General Assembly rejected plans offered by both Republicans and nonpartisan groups for locating the second majority-minority district in the south-central to southeast part of the state." *Id.* at 5a n.3.

Blacks constitute approximately 22 percent of the total population and 20 percent of the VAP of North Carolina. App., *infra*, 15a, 16a. Under the State's plan, blacks constitute approximately 53 percent of the VAP in each of the two majority-minority districts. *Id.* at 16a. They constitute between 14 percent and 21 percent of the VAP in six other districts. *Ibid.* And they constitute less than 9 percent of the VAP in the four remaining districts. *Ibid.* Whites constitute approximately 76 percent of the total population and 78 percent of the VAP of North Carolina. *Id.* at 15a, 16a. Under the State's plan, whites are a

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[2] The State's preclearance submission indicates that the population of District 12 is predominantly urban; 80 percent of the residents in District 12 live in cities with populations of 20,000 or more. In contrast, the other majority-minority district—District 1—is predominantly rural. More than 80 percent of the residents of that district live outside cities with populations of 20,000 or more.

voting majority in 10 (or 83 percent) of the 12 congressional districts. *Id.* at 16a.

The State submitted its revised redistricting plan to the Attorney General for preclearance under Section 5. The Attorney General did not interpose an objection to the revised plan. App., *infra*, 13a-14a.

3. Thereafter, appellants, who are five white voters residing in either District 12 or District 2 (J.S. App. 5a, 18a), brought suit in the United States District Court for the Eastern District of North Carolina challenging the validity of the State's revised congressional redistricting plan.[3] Specifically, appellants alleged that the Attorney General and the Assistant Attorney General for the Civil Rights Division (the federal appellees), in furtherance of their erroneous belief "that the Voting Rights Act requires the creation of districts containing a majority of minority persons * * * to assure the election of minority persons as members of Congress," had unconstitutionally and without legal authorization "coerced the State of North Carolina into creating two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation * * * in the United States House of Representatives." J.S. App. 85a, 88a, 90a. In addition, appellants alleged that the State had "submitt[ed]" to this unconstitutional coercion, thereby

[3] A second lawsuit challenging the plan was filed by other plaintiffs. J.S. App. 5a n.3. Those plaintiffs alleged that the State's rejection of a majority-black district in the southern portion of the State in favor of District 12 was the result of political gerrymandering motivated by the desire to protect Democratic incumbents. *Ibid.* A three-judge court dismissed that suit, *ibid.*, and this Court summarily affirmed. *Pope* v. *Blue*, 113 S. Ct. 30 (1992).

becoming "an unwilling, but necessary, participant in creating a racially discriminatory voting process." *Id.* at 93a.

Appellants further alleged that the actions of the federal and state appellees in intentionally drawing two majority-minority districts deprived appellants and all other citizens of North Carolina of their right "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters." J.S. App. 89a-90a. Appellants claimed that the actions of the federal appellees violated their rights under Article 1, Sections 2 and 4 of the Constitution; the Privileges and Immunities Clause; the Due Process Clause of the Fifth Amendment; and the Fifteenth Amendment. J.S. App. 70a. Appellants claimed that the actions of the state appellees violated their rights under Article 1, Sections 2 and 4 of the Constitution; the Equal Protection Clause of the Fourteenth Amendment; and the Fifteenth Amendment. J.S. App. 70a.

As relief, appellants sought a declaration that the State's existing plan is unconstitutional and an injunction against its enforcement. J.S. App. 96a, 98a. In addition, they sought an order directing the State to prepare a new plan that "will not concentrate in any Congressional district persons of a particular race * * * in a manner that is totally unrelated to considerations of compactness, contiguousness, and geographic or jurisdictional communities of interest." *Id.* at 96a-97a. Appellants also sought an injunction preventing the Attorney General from requiring the creation of such districts as a condition of preclearance. *Id.* at 95a-96a.

4. The three-judge district court dismissed appellants' claims against the federal appellees for want

of jurisdiction and for failure to state a claim. J.S. App. 7a-12a. The court held that only the United States District Court for the District of Columbia has jurisdiction to enjoin actions of the Attorney General taken under Section 5 (J.S. App. 9a-11a), and that no court has authority to review the Attorney General's preclearance decisions (*id.* at 11a-12a).

The district court also dismissed appellants' claims against the state appellees for failure to state a claim. The court deemed the Equal Protection Clause to be "the only relevant, or most inclusive," source of law in determining the validity of race-conscious redistricting. J.S. App. 14a. The other provisions cited by appellants, the court held, either afford no protection against race-conscious redistricting or provide no more protection than the Equal Protection Clause. *Id.* at 14a-16a & nn.6, 7.

The court next rejected appellants' claim that the Equal Protection Clause requires color-blind redistricting. J.S. App. 18a-21a. The court concluded that this claim was "flatly foreclosed" by this Court's decision in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) [hereinafter *UJO*], in which this Court upheld the State of New York's deliberate creation of several majority-minority districts. J.S. App. 18a-19a. The district court noted that while there was no majority opinion for the Court, seven of the eight Justices who participated in *UJO* had expressly or implicitly rejected the argument that the use of race in formulating district lines is unconstitutional *per se*. *Id.* at 19a n.8. The court further held that subsequent decisions by this Court do not cast doubt on that holding. *Id.* at 20a-21a.

Finally, the district court rejected appellants' narrower claim that the State's revised redistricting plan

is unconstitutional because the State created two racially gerrymandered districts in order to ensure proportional representation for blacks without regard to considerations of compactness, contiguousness, and communities of interest. J.S. App. 21a-24a. Under *UJO*, the court held, whites challenging a redistricting plan must allege and prove that the plan "was adopted with the purpose and effect of discriminating against white voters * * * on account of their race." *Id.* at 22a-23a. The court further explained that the "requisite intent * * * is a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters—on a statewide basis—to participate in the political process and to elect candidates of their choice." *Id.* at 23a. Because appellants alleged only that the State intended to favor black voters in order to comply with the Voting Rights Act, the court concluded that appellants had failed to allege the necessary "invidious" intent. *Ibid.*

The court also held that appellants had failed to allege "the requisite unconstitutional effect." J.S. App. 23a. The court reasoned that the State's plan "demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis." *Id.* at 23a-24a. Accordingly, the court concluded that the "mere fact" that white voters in District 12 may not be able to elect candidates of their choice "is not a cognizable constitutional" injury. *Id.* at 24a.

5. Judge Voorhees dissented in part. He agreed that the court lacked jurisdiction to decide appellants' claim against the Attorney General. J.S. App. 27a. He also agreed that race-conscious redistricting is not unconstitutional *per se*. *Id.* at 36a. He con-

cluded, however, that a State may not necessarily use race in redistricting to the exclusion of "sound districting principles" such as compactness, contiguity, communities of interest, residential patterns, and population equality. *Id.* at 39a-40a; see generally *id.* at 36a-44a. In addition, Judge Voorhees noted that the State had "rebuffed" the proposal to create a majority-minority district in the southern part of the State (*id.* at 42a-43a), and he observed that the State's decision to shift the majority-minority district to the area along the highway "could be indicative of a racial animus" against white voters assigned to the highway district. *Id.* at 44a. Judge Voorhees concluded that the facts alleged in the complaint, taken together, were sufficient to "augur a constitutionally suspect, and potentially unlawful, intent on the part of the State Defendants." *Id.* at 43a. Accordingly, dismissal for failure to state a claim was, in Judge Voorhees' view, inappropriate.

Judge Voorhees also deemed it significant that the Attorney General's objection letter had specifically discussed proposals for a second majority-minority district in the southern part of the State, proposals that the State chose not to implement. J.S. App. 49a-55a. According to Judge Voorhees, *UJO* creates a presumption of validity only for those race-conscious redistricting plans that codify *in toto* the Attorney General's preclearance decision. *Id.* at 51a-52a. That presumption was unavailable here, in Judge Voorhees' view, because the State had acted in "purposeful disregard of the Attorney General's recommendations." *Id.* at 55a.

SUMMARY OF ARGUMENT

A. The question framed by the Court is not presented to the extent it assumes that the Attorney General suggested a particular redistricting plan to be adopted by the State. Section 5 of the Voting Rights Act does not empower the Attorney General to draw redistricting plans to be adopted by submitting jurisdictions. Rather, when the Attorney General objects to a particular proposed redistricting plan and indicates that a revised plan will not be precleared unless it increases minority voting power, the decision about how to achieve that result is left to the submitting jurisdiction. Thus, in this case, the Attorney General objected to the State's plan on the ground that it failed to create a second majority-minority district, but he did not suggest that the State adopt any particular revised plan in order to cure that violation.

To be sure, the Attorney General's objection letter did refer to the existence of alternative plans that would have created a second majority-minority district in the southern portion of the State, but it did so only in the context of explaining to the State the reasons for the objection. Thus, the Attorney General did not in fact "suggest[]" a particular plan to be adopted by the State, and the State had considerable leeway in revising its redistricting plan to create a second majority-minority district.

B. 1. The State's use of race in drawing its revised redistricting plan was constitutionally permissible under this Court's decision in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) [hereinafter *UJO*]. In that case, a four-Justice plurality concluded that a State could

constitutionally redistrict along racial lines in order to comply with the Attorney General's construction of Section 5, at least where that construction was authorized by the statute. 430 U.S. at 162-165 (opinion of White, J.). Two additional Justices concluded that a State's intent to satisfy the Attorney General's Section 5 objection, standing alone, precluded any finding that the State had acted with invidious discriminatory intent in intentionally creating majority-minority districts. *Id.* at 179-180 (Stewart, J., joined by Powell, J., concurring in the judgment).

UJO is controlling here. The Attorney General objected to the original redistricting plan proposed by the State because he determined that the State had failed to meet its burden of showing that its plan was free of discriminatory purpose. In particular, the Attorney General determined that the State failed to create a second majority-minority district for what appeared to be pretextual reasons. That determination "was authorized by [this Court's] constitutionally permissible construction of § 5." *UJO*, 430 U.S. at 164. Accordingly, the State's race-conscious creation of District 12 in order to satisfy the Attorney General's Section 5 objection was permissible under the rationale of *UJO*.

2. To be sure, a State's intent to satisfy the requirements of Section 5 does not insulate the State's use of race from all challenges whatsoever. There is no contention here, however, that the State took race into account in an attempt to minimize the voting strength of any racial group to any greater degree than was necessary in order to avoid a violation of Section 5 by drawing a second majority-minority district. Nor is there any allegation that the State's decision to create the particular majority-minority district it did was the result of an invidious racially discriminatory purpose.

The fact that the State's revised redistricting plan moves some white voters, but not others, from majority-white districts into a majority-minority district also does not demonstrate invidious racial discrimination. That result is inevitable if States are to be permitted to comply with Section 5 by creating majority-minority districts, and *UJO* clearly holds that creation of such districts is appropriate in order to comply with Section 5.

3. The fact that District 12 is neither compact nor aesthetically pleasing does not undermine the constitutionality of the State's decision to draw that district. The Constitution does not require compact districts, and the States are free to reject redistricting criteria such as compactness in favor of other policy objectives as they see fit. The State's decision to create District 12 rather than some other majority-minority district was not based on racial considerations, and thus appellants' challenge to the configuration of that district is without merit.

C. Nothing in this Court's more recent cases undermines the validity of *UJO* in the redistricting context. While the courts may appropriately treat most forms of race-conscious action by state and local government as suspect, the situation is different with respect to redistricting, because in that context state and local authorities must sometimes act in a race-conscious manner in order to comply with the Voting Rights Act. The Act requires state and local governments to draw majority-minority districts in certain circumstances, and thus Congress has in effect commanded redistricting authorities to take race into account to the extent necessary to comply with the Act.

Accordingly, a State's use of race to draw majority-minority districts cannot be treated as suspect.

ARGUMENT

THE STATE'S INTENTIONAL USE OF RACE FOR THE PURPOSE OF COMPLYING WITH THE VOTING RIGHTS ACT DOES NOT CONSTITUTE INVIDIOUS RACIAL DISCRIMINATION IN VIOLATION OF THE CONSTITUTION

A. The Question Framed By The Court Is Not Presented To The Extent That It Assumes That The Attorney General Suggested A Particular Plan To The State

In reviewing proposed redistricting plans under Section 5, the Attorney General looks to whether the jurisdiction has satisfied its burden of showing that the plan "does not have the purpose and will not have the effect" of diluting minority voting strength. 42 U.S.C. 1973c. If the Attorney General concludes that a jurisdiction has failed to satisfy that burden with respect to a particular plan, the Attorney General objects to that plan and states the reasons for the objection. 28 C.F.R. 51.44(a). The Attorney General is not empowered, however, to draw a new plan to be adopted by the submitting jurisdiction.

To be sure, a finding by the Attorney General that a jurisdiction's proposed plan has the purpose or effect of diluting minority voting strength may, depending on the circumstances, indicate that a revised plan will not be precleared unless it increases minority voting strength to the extent necessary to satisfy the objection. But the decision about how to increase minority voting strength in a revised plan is left entirely to the submitting jurisdiction, in keeping with this Court's repeated pronouncements that state and local jurisdictions have the primary responsibility

for devising new redistricting plans to remedy past violations. See, *e.g.*, *Wise* v. *Lipscomb*, 437 U.S. 535, 539-541 (1978) (opinion of White, J.); *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977); *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964).

The Attorney General followed this statutory and regulatory framework in his treatment of North Carolina's congressional redistricting plan. The Attorney General objected to the original plan submitted by the State because the State had failed to show that its plan was free of discriminatory purpose. In particular, the Attorney General determined that the State had failed to draw a second majority-minority district for what appeared to be pretextual reasons. App., *infra*, 9a-11a; J.S. App. 3a-4a. The Attorney General did not, however, suggest that the State adopt any particular revised plan in lieu of its invalid original submission.

In explaining the reasons for the objection, of course, the Attorney General did note that "[f]or the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature," and that "such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons." App., *infra*, 10a-11a; J.S. App. 4a. Those statements were in keeping with the Justice Department's usual approach in such cases: One of the factors routinely considered by the Attorney General in determining whether a proposed redistricting plan evinces a discriminatory intent is the "extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered." 28 C.F.R. 51.59(e). Refer-

ence to such alternatives in an objection letter has a limited purpose: to help the jurisdiction understand why the Attorney General has concluded that the existing plan is not free of discriminatory purpose. 28 C.F.R. 51.44(a). It does not constitute a direction, or even a suggestion, that the jurisdiction must cure an objection in a particular way.

Thus, the Attorney General's mention of alternative plans in his objection letter in this case did not constitute a suggestion that the State adopt one of those plans or draw a second majority-minority district in a particular area or in a particular way. Rather, the decision about how to draw a second majority-minority district was left to the State.[4]

The question to be briefed in this case assumes that the State "did not accede to the plan suggested by the Attorney General but instead developed its own." As the previous discussion demonstrates, however, the Attorney General did not "suggest[]" a particular revised plan to be adopted by the State. The objection letter plainly stated that the State would have to draw a second majority-minority district in order to receive preclearance from the Attorney General, but it did not suggest any one means of accomplishing that objective.[5]

[4] This does not mean, of course, that the State was free to draw a second majority-minority district in any manner it saw fit. All redistricting plans adopted by covered jurisdictions must be precleared under Section 5, including those "designed to remove the elements that caused objection by the Attorney General to a prior submitted [plan]." 28 C.F.R. 51.12. Thus, when the State revised its redistricting plan, it submitted that revised plan to the Attorney General, who was required to determine once again whether the State had satisfied its burden of proving the absence of discriminatory purpose and effect. After determining that the State's revised plan was free of discriminatory purpose and effect, the Attorney General did not interpose an objection to that plan. App., *infra*, 13a-14a.

Appellants have never argued otherwise. In their complaint, appellants did not allege that the Attorney General suggested one plan and the State decided to craft another. To the contrary, they alleged that the Attorney General coerced the State into drawing the very plan at issue here. J.S. App. 88a. Their brief in this Court similarly does not contend that the Attorney General suggested one way to draw a second majority-minority district, while the State chose another. See Appellants' Br. 76, 78.[6]

Thus, we address below the remaining aspects of the question framed by the Court: whether the State's race-conscious and purposeful creation of two majority-minority districts in its revised redistricting plan was a constitutionally permissible response to the Attorney General's suggestion in his objection

[5] As noted above (pp. 2-3 & n.1, *supra*), the State could have requested that the Attorney General reconsider his objection, and could have sought judicial preclearance by filing a declaratory judgment action in the United States District Court for the District of Columbia. The State chose not to exercise either of those options.

[6] In his dissent, Judge Voorhees concluded that by drawing a second majority-minority district along Interstate 85 rather than in the southern part of the State, the State had "disregarded" the Attorney General's "prescriptions for reapportionment in North Carolina" "in favor of its own predilections." J.S. App. 52a, 53a. In approaching the case in this fashion, however, Judge Voorhees misunderstood both the Attorney General's objection letter and the nature of appellants' complaint.

letter that creation of a second such district was necessary in order to ensure compliance with Section 5.[7]

B. The State's Use Of Race In Creating Its Revised Redistricting Plan Was Constitutionally Permissible Under This Court's Voting Rights Precedents

Appellants contend that the State's explicit use of race to draw two majority-minority districts unconstitutionally discriminated against white voters in North Carolina, either because the use of race as a factor in redistricting is unconstitutional *per se* (Br. 20-51) or because the State's use of race in this case cannot survive strict scrutiny (Br. 52-68). This Court addressed a similar claim in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) [hereinafter *UJO*].[8] While members of the Court differed somewhat in their precise rationales, seven of the eight Justices participating agreed that the use of race in redistricting is not unconstitutional *per se*, and that a State's intentional

[7] In keeping with the Court's order framing the question to be briefed by the parties, we will not present argument concerning our contentions that the district court (and, therefore, this Court as well) lacked subject matter jurisdiction over appellants' claims against the federal appellees and that, in any event, the Attorney General's exercise of his authority under Section 5 is not subject to judicial review. We continue to maintain those positions, however. See U.S. Mot. to Aff. 6-13.

[8] In *UJO*, the United States urged the Court to reject the view that race is never a permissible consideration in redistricting. In particular, we argued that this contention "ignores the unavoidable realities of legislative redistricting and would make compliance with [Section 5] virtually impossible in the context of redistricting." 75-104 U.S. Br. at 39.

creation of majority-minority districts does not necessarily violate the constitutional rights of white voters. Under *UJO*, North Carolina's deliberate use of race to create two districts in which blacks constitute a majority was constitutional because it was a permissible way for North Carolina to achieve compliance with Section 5.

1. In *UJO*, the State of New York had "deliberately revis[ed] its reapportionment plan along racial lines" in order to create several districts in which minorities would constitute at least 65 percent of the population. 430 U.S. at 155, 162 (opinion of White, J.). In so doing, the State was motivated by an intent "to comply with the Voting Rights Act as construed by the Attorney General." *Id.* at 155. A plurality of four Justices rejected the claim that this was an insufficient justification for using race in drawing district lines. *Id.* at 162-165. The plurality reasoned that Section 5 is constitutional in its "authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color," and that the State "did [no] more than accede to a position taken by the Attorney General that was authorized by * * * § 5." *Id.* at 161, 164.

Two additional Justices also concluded that a State could permissibly resort to race to achieve compliance with Section 5. 430 U.S. at 179-180 (Stewart, J., joined by Powell, J., concurring in the judgment). Those Justices were of the view that the State's intention to satisfy the Attorney General's objections "foreclose[d] any finding that it acted with the invidious purpose of discriminating against white voters," regardless of whether the Attorney General's position "was required or even authorized by the

Voting Rights Act." 430 U.S. at 180 & n.*. For those two Justices, it was sufficient "that the Voting Rights Act and the procedures used to implement it are constitutionally valid, and that the procedures followed in this case were consistent with the Act." *Id.* at n.* (citations omitted).

North Carolina's decision to create two majority-minority districts is constitutional under the rationale of the *UJO* plurality and, *a fortiori*, under that of the two concurring Justices. In his objection letter, the Attorney General explained that the State had not shown that its plan was free of discriminatory purpose. In particular, the Attorney General determined that the State's reasons for failing to draw a second majority-minority district appeared to be pretextual. App., *infra*, 10a-11a. For that reason, he concluded that the original plan could not be precleared. *Id.* at 11a. As in *UJO*, that determination was unquestionably "authorized by * * * § 5." *UJO*, 430 U.S. at 164. Section 5 requires the Attorney General to object to proposed redistricting plans that have a discriminatory "purpose," and the submitting jurisdiction bears the burden of demonstrating the absence of such impermissible purpose. 28 C.F.R. 51.52(a); see *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 471 & n.11 (1987); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Thus, in this case the State had the burden of demonstrating that its failure to create a second majority-minority district was not motivated by a discriminatory purpose. The Attorney General determined (App., *infra*, 11a) that the State failed to meet that burden, a determination that "was authorized by [this Court's] constitutionally permissible construction of § 5." *UJO*, 430 U.S. at 164. Accordingly, there would be no ground for contesting the Attorney General's right to object to the State's original redistricting plan, even if that issue were properly before the Court. But see *Morris* v. *Gressette*, 432 U.S. 491, 504-507 (1977) (holding that the Attorney General's exercise of administrative discretion under Section 5 is not subject to judicial review in any court).

As appellants have conceded, in deciding to draw a plan with a second majority-minority district, North Carolina simply acquiesced in the Attorney General's finding of a Section 5 violation. Accordingly, the State's decision to create a second majority-minority district was permissible under *UJO*.

2. To be sure, the fact that the State drew revised District 12 in an effort to avoid a violation of Section 5 does not preclude a challenge to the *manner* in which the State drew that District. For example, the State's intention to avoid a violation of Section 5 would not shield the State from liability if it chose to adopt a particular plan not merely because that plan created a second majority-minority district but also because it, unlike other plans containing two majority-minority districts, served to minimize the voting power of another racial group. Appellants do not allege, however, that the State's plan diminished white voting strength to a greater extent than would have been the case with *any* plan designed to avoid a violation of Section 5 by drawing a second majority-minority district, nor do they allege that the State intended to achieve any such result. Absent such an allegation, this case falls squarely within the rationale of *UJO*, because the State's use of race was intended

to avoid a violation of Section 5. *UJO*, 430 U.S. at 164-165.

In his dissenting opinion below, Judge Voorhees emphasized that the State could have drawn a second district in the southern part of the State, rather than along Interstate 85. Had the State chosen that course, however, the overall impact on white voters would have been precisely the same: white voters would have been the majority in ten congressional districts, and the minority in two. Nothing about the State's selection of the particular configurations it chose for the two majority-minority districts demonstrates an invidious racially discriminatory purpose, and appellants make no allegation to the contrary.

As the dissent noted, District 12 affects different white voters than those who would have been affected had the majority-minority district been created in the southern portion of the State instead. But there is no allegation that the choice of *which* white voters would be affected by the second majority-minority district was made for race-related reasons.[9] In order to devise a revised plan that satisfied the requirements of Section 5, the State necessarily had to move some white voters who had previously been in a majority-white district into a majority-black district. That inevitable consequence of curing an objection cannot be invidious under *UJO*. If white voters who were assigned to a majority-minority district in order to cure a Section 5 violation could successfully challenge a State's redistricting plan on the ground that some

[9] Indeed, it is doubtful that any such allegation could be made: A State's decision to burden one group of white voters rather than another would generally not support an inference of racially discriminatory purpose.

other group of white voters could have been so assigned instead, the State would be precluded from ever curing such violations. *UJO* clearly holds that the States *may* create additional majority-minority districts in order to avoid violations of Section 5, and thus claims of this type must be rejected.

3. Appellants assert (Br. 63-65) that the State's plan violates all accepted neutral redistricting criteria, and that *UJO* therefore does not authorize the State's use of race in redistricting. Appellants' claim that the State ignored all relevant redistricting considerations is, however, overstated. For example, the districts in the State's revised plan do not vary impermissibly in population, nor is any district composed of discrete segments located in entirely different parts of the State.

It is true that District 12 is neither compact nor aesthetically pleasing. And it may be that a southern majority-minority district would have been less subject to criticism on those grounds. J.S. App. 5a n.3 (noting the support for this alternative by various groups); *id.* at 3a-4a (noting that the shape of such a district would have been no more irregular than that of the other districts in the State's plan). But those qualities are not constitutional imperatives. The State was free to decide that other interests, such as the desire to protect incumbents or to create a predominantly urban district, favored the selection of District 12 over a southern district. See note 2, *supra*. Balancing those kinds of competing policy considerations is a legislative, not a judicial, function. See *Pope* v. *Blue*, No. 3:92CV71-P (W.D.N.C. Apr. 16, 1992), reproduced in 91-2038 J.S. App. at 3a-16a (rejecting contention that the plan at issue here is

unconstitutional because it arbitrarily disregarded standards of contiguity and compactness, *id.* at 12a), aff'd mem., 113 S. Ct. 30 (1992). North Carolina did not lose its power to strike a balance among competing policy considerations merely because it was also seeking to comply with Section 5.

Whatever concerns there may be about the State's choice of District 12 over a southern district, they are not racial ones. Both District 12 and the various proposed southern majority-minority districts were intended to have the same racial effect: creation of a second congressional district in which blacks constituted a majority of the VAP, with a concomitant reduction in the number of white-controlled districts. That effect is precisely the result contemplated by the Attorney General's objection: one more majority-black district and one fewer majority-white district. The State's consideration of race in drafting its revised plan therefore did not violate the Constitution, because race was considered for the unquestionably legitimate purpose of complying with Section 5.[10]

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[10] In *UJO*, three Justices concluded that, quite apart from the obligations imposed by the Voting Rights Act, a jurisdiction could take race into account in redistricting as long as the redistricting plan as a whole did not "minimize or unfairly cancel out" the voting strength of any racial group. *UJO*, 430 U.S. at 165 (opinion of White, J.); see also *id.* at 167 (redistricting plan based on racial factors permissible if it sought "to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters"). There is no need in this case to decide whether that rationale would provide an additional ground for affirming the district court's judgment. We note, however, that *UJO* necessarily stands for the proposition that a State's use of race to comply with the Voting Rights Act is not rendered unconstitutional simply because the State may also be seeking to achieve a fair allocation of political power.

C. This Court's Recent Decisions Concerning The Validity Of Race-Conscious Government Action Do Not Undermine The Propriety Of Race-Conscious Redistricting Undertaken In Order To Avoid Violations Of The Voting Rights Act

Appellants contend (Br. 65) that *UJO* has been undercut by this Court's subsequent decisions. In particular, appellants rely on *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), which held that racial classifications by state and local governments generally must be subjected to strict scrutiny, regardless of "the race of those burdened or benefited." *Id.* at 494 (opinion of O'Connor, J.). In our view, nothing in *Croson* or the other cases relied on by appellants undermines the continued vitality of *UJO* in the redistricting context.

Appellants' attempt to analogize race-conscious redistricting to other types of race-conscious government action is fatally flawed, because it ignores a crucial factor that is unique to the redistricting context. In other contexts, the courts may appropriately treat race-conscious action by state and local government as suspect, because race usually has no legitimate role to play in activities such as hiring, contracting, and jury selection. See, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond* v. *J.A. Croson Co.*, *supra*; *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991); *Georgia* v. *McCollum*, 112 S. Ct. 2348 (1992). When they engage in activities of that nature, state and local jurisdictions can comply with the dictates of federal law simply by using race-neutral practices,

and thus there is generally no need or justification for them to act in a race-conscious manner.

The situation is much different with respect to redistricting. Even where redistricting authorities have not engaged in purposeful racial discrimination, they must sometimes act in a race-conscious manner in order to fulfill their obligations under the Voting Rights Act. See *UJO*, 430 U.S. at 159, 161 (opinion of White, J.). Section 5, for example, requires covered jurisdictions intentionally to draw majority-minority districts where necessary to avoid retrogression in minority voting strength or when the failure to draw a majority-minority district would reflect purposeful discrimination. *Id.* at 159-161; see generally *Beer* v. *United States*, 425 U.S. 130, 140-142 (1976); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Section 2 of the Voting Rights Act requires all state and local jurisdictions to draw majority-minority districts if the failure to do so would lead to discriminatory "results." 42 U.S.C. 1973(a); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Accordingly, if state and local governments are to make good faith efforts to comply with their obligations under federal law, it will frequently be the case that they must engage in race-conscious redistricting.

Any other result would fly directly in the face of Congress's enactment of the Voting Rights Act itself. In effect, Congress has commanded the States and their political subdivisions to redistrict in a race-conscious manner to the extent necessary to avoid violations of the Act. Cf. *Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) (" 'Congress may authorize, pursuant to section 5 [of the Fourteenth Amendment], state action that would be foreclosed to the states acting alone.' ") (quoting Bohrer, Bakke,

Weber, *and* Fullilove: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 Ind. L.J. 473, 512-513 (1981)). To view the purposeful drawing of majority-minority districts as suspect would ignore the legal landscape in which redistricting authorities must operate, and would undermine Congress's decision to require such conduct where necessary to avoid discriminatory results.[11] Accordingly, the conclusion is inescapable that *UJO*, not *Croson*, states the proper approach in judging the validity of race-conscious redistricting actions taken in order to avoid violations of the Voting Rights Act.

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[11] Moreover, as this Court has recognized, redistricting is not a "neutral" phenomenon. It "inevitably has and is intended to have substantial political consequences." *Gaffney* v. *Cummings*, 412 U.S. 735, 752-753 (1973). For this reason, groups with distinctive political interests seek to influence the way in which district boundaries are drawn. Those participating in this process include not only political parties, groups with the same occupation, and groups with the same socio-economic status, but also racial, ethnic, and religious groups. *Whitcomb* v. *Chavis*, 403 U.S. 124, 156 (1971); *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment). In redistricting, a State seeks to "reconcile the competing claims of [these] groups." *Davis*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment). One of the principal goals of the Voting Rights Act is to ensure that States do not perform that task in a manner that discriminates against racial minorities.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

THOMAS G. HUNGAR
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
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Attorneys

FEBRUARY 1993

APPENDIX A

STATUTORY PROVISIONS INVOLVED

42 U.S.C.:

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect

of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

APPENDIX B

[SEAL]

U.S. DEPARTMENT OF JUSTICE

Civil Rights Division

Dec. 18, 1991

Office of the Assistant Attorney General
Washington, D.C. 20035

Tiare B. Smiley, Esq.
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to Chapter 675 (1991), which provides for the 1991 redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 75 single-member districts and 20 multimember districts for the House of Representatives; Chapter 676 (1991), which provides for the 1991 redistricting plan and a change in the method of election from 22 single-member districts and 28 multimember districts to 34 single-member districts and 8 multimember districts for the Senate; and Chapter 601 and Chapter 761 (1991), which provide for the increase from eleven to twelve congressional districts and the 1991 redistricting plan for the congressional districts for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for more information on November 5, 1991; supplemental information was received on November 18, 20, 21, 25, 26 and 27, and December 4, 10, 12 and 13, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. At the outset, we note that 40 of North Carolina's 100 counties are covered under the special provisions of Section 5 of the Voting Rights Act. As it applies to the redistricting process, the Voting Rights Act requires the Attorney General to determine whether the submitting authority has sustained its burden of showing that each of the legislative choices made under a proposed plan is free of racially discriminatory purpose or retrogressive effect and that the submitted plan will not result in a clear violation of Section 2 of the Act. In the case of statewide redistrictings such as the instant ones, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at a particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities, see, e.g., *Garza* v. *Los Angeles County*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Ketchum* v. *Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), or where the proposed plan, given the demographics and racial concentrations in the jurisdiction, does not fairly reflect minority voting strength. *Thornburg* v. *Gingles*, 478

U.S. 30 (1986); *Hastert* v. *State Board of Elections*, —— F. Supp. —— (N.D. Ill., Nov. 6, 1991), 1991 WL 228185; *Wilkes County, Georgia* v. *United States*, 450 F. Supp. 1171, 1176 (D.D.C. 1978), *aff'd. mem.*, 439 U.S. 999 (1978).

Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict and the options available to the legislature. Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction guarantee minority voters racial or ethnic proportional results.

With this background in mind, our analysis shows that, in large part, in North Carolina House, Senate and Congressional redistricting plans meet the Section 5 preclearance requirements. Each plan, however, has particular problems which raise various concerns for us under the Voting Rights Act. We describe each of these problem areas separately below.

Respecting the House plan, the proposed configuration of district boundary lines in the following three areas of the state appear to minimize black voting strength: the Southeast area, involving Sampson, Pender, Bladen, Duplin, New Hanover, Wayne, Lenoir and Jones Counties; the Northeast area in which the state proposes to create District 8; and Guilford County.

In general, it appears that in each of these areas the state does not propose to give effect to overall

black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect candidates of their choice. Another factor which appears to adversely impact on minority voting strength, by limiting the number of majority minority districts, was the state's decision to manipulate black concentrations in a way calculated to protect white incumbents.

In the Southeast area of the state, the state was aware of the significant interest on the part of the black community in creating districts in which they would constitute a majority. In fact, alternatives providing for two additional black majority districts were presented to the legislature. Rather than using this approach to recognize black voting strength, however, the proposed plan submerges concentrations of black voters in several multimember, white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

In the Northeastern portion of the state, District 8 seems to have been drawn in such a way as to limit unnecessarily the potential for black voters to elect representatives of their choice. In spite of the 58 percent black population majority, serious concerns have been raised as to whether black voters in this district will have an equal opportunity to elect their preferred candidate, particularly given the fact that only 52 percent of the registered voters in the

district are black. Our analysis indicates that a number of different options are available to draw District 8 in a manner which provides blacks an equal opportunity to participate in the electoral process (e.g., including in District 8 black concentrations in adjoining districts).

Similarly, in Guilford County, the proposed plan fails to recognize black population concentrations, although reasonable configurations of boundary lines would permit an additional district that would provide black voters the opportunity to elect their candidates of choice. While we have noted the state's assertion that the division of the black community in Guilford County into several districts enhances black voting strength by providing black voters an opportunity to influence elections in additional districts, it appears that the plan in fact was designed to ensure the re-election of white incumbents. This conclusion is bolstered by what appears to be similarly motivated decisions of the legislature involving other areas of the state, such as in Mecklenburg County. There, the state drew two minority House districts, while the minority population appears to be sufficiently concentrated to allow for the drawing of three districts in which black voters would have an opportunity to elect candidates of their choice. While we are aware that Mecklenburg is not a county subject to the preclearance requirements of Section 5, information regarding the choices of boundary line changes in the county is relevant to our review of the concern that purposeful choices were made throughout the redistricting processes that adversely impact minority voting strength.

Respecting the Senate redistricting plan, the state has proposed district boundary lines in the southeast

region of the state that appear to minimize black voting strength, given the particular demography of this area. Although boundary lines logically could be drawn to recognize black population concentrations in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect a candidate of their choice, the proposed districts seem to be the result of the state's decision to use concentrations of black voters in white majority districts to protect white incumbents. Black citizens from this area testified that they felt a black majority single-member district could be fairly drawn, and alternatives providing for a black majority district were presented to the legislature. It appears, however, that concentrations of black voters have been submerged in several white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

Respecting the congressional redistricting plan, we note that North Carolina has gained one additional congressional seat because of an increase in the state's population. The proposed congressional plan contains one majority black congressional district drawn in the northeast region of the state. The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or

effect of minimizing minority voting strength in that region.

As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state. *Jeffers* v. *Clinton*, 730 F.Supp. 196, 207 (E.D. Ark. 1989), *affirmed*, 111 S. Ct. 662 (1991).

We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. No alternative plan providing for a second majority-minority congressional district was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second

majority-minority congressional district was dismissed for what appears to be pretextual reasons. Indeed, some commenters have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ling] out the voting strength of [black and Native American minority voters]." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). Although invited to do so, the state has yet to provide convincing evidence to the contrary.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting for the North Carolina State House, Senate and Congressional plans to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistrictings for the North Caro-

lina House, Senate and Congressional plans continue to be legally unenforceable. *Clark* v. *Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of North Carolina plans to take concerning these matters. If you have any questions, you should call Richard Jerome (202-514-8696), an attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

APPENDIX C

[SEAL]

U.S. DEPARTMENT OF JUSTICE

Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20035

February 6, 1992

Tiare B. Smiley, Esq.
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to Chapter 7, (1991 Extra Session), which provides for the redistricting of congressional districts and an increase from eleven to twelve congressional districts; Chapter 5 (1991 Extra Session), which provides for the redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 81 single-member districts and 17 multimember districts for the North Carolina House of Representatives; and Chapter 4 (1991 Extra Session), which provides for the redistricting and a change in the method of election from 22 single-member districts and 28 multimember districts to 34 single-member districts and 8 multimember districts for the Senate for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the House and Senate submissions on January 17, 1992; supple-

mental information was received on January 23, 24, 27, 28, and 30, 1992. We received the congressional submission on January 28; supplemental information was received on January 31.

The Attorney General does not interpose any objection to the specified changes contained in the three plans. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedure for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

APPENDIX D

NORTH CAROLINA

District Summary
Total Populations, All Ages
Plan: 1992 Congressional Base Plan #10

Plan type: Congressional Base Plan

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/ PI	Total Other
District 1	552,386	229,829	316,290	3,424	1,146	1,698
	100.00%	41.61%	57.26%	0.62%	0.21%	0.31%
District 2	552,386	421,083	121,212	3,154	4,077	2,860
	100.00%	76.23%	21.94%	0.57%	0.74%	0.52%
District 3	552,387	423,398	118,640	2,436	4,044	3,869
	100.00%	76.65%	21.48%	0.44%	0.73%	0.70%
District 4	552,387	426,361	111,168	1,548	10,602	2,714
	100.00%	77.19%	20.13%	0.28%	1.92%	0.49%
District 5	552,386	463,183	83,824	1,083	2,448	1,848
	100.00%	83.85%	15.17%	0.20%	0.44%	0.33%
District 6	552,386	504,465	41,329	1,973	3,489	1,129
	100.00%	91.32%	7.48%	0.36%	0.63%	0.20%
District 7	552,386	394,855	103,428	40,166	5,835	8,102
	100.00%	71.48%	18.72%	7.27%	1.06%	1.47%
District 8	552,387	402,406	128,417	13,789	4,232	3,543
	100.00%	72.85%	23.25%	2.50%	0.77%	0.64%
District 9	552,387	492,424	49,308	1,729	7,373	1,553
	100.00%	89.14%	8.93%	0.31%	1.33%	0.28%
District 10	552,386	517,542	30,155	942	2,238	1,510
	100.00%	93.69%	5.46%	0.17%	0.41%	0.27%
District 11	552,387	502,058	39,767	7,835	1,791	936
	100.00%	90.89%	7.20%	1.42%	0.32%	0.17%
District 12	552,386	230,888	312,791	2,077	4,891	1,739
	100.00%	41.80%	56.63%	0.38%	0.89%	0.31%
Total	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

NORTH CAROLINA

District Summary
Voting Age Populations
Plan: 1992 Congressional Base Plan #10

Plan type: Congressional Base Plan

District Name	Total Vot. Age	Vot. Age White	Vot. Age Black	Vot. Age Am. Ind.	Vot. Age Asian/ PI	Vot. Age Other
District 1	399,969	181,933	213,602	2,428	844	1,110
	100.00%	45.49%	53.40%	0.61%	0.21%	0.28%
District 2	420,087	328,676	84,311	2,173	3,074	1,963
	100.00%	78.24%	20.07%	0.52%	0.73%	0.47%
District 3	413,263	324,808	81,170	1,755	2,922	2,608
	100.00%	78.60%	19.64%	0.42%	0.71%	0.63%
District 4	428,984	336,850	81,210	1,239	7,782	1,903
	100.00%	78.52%	18.93%	0.29%	1.81%	0.44%
District 5	428,782	364,886	60,204	822	1,650	1,221
	100.00%	85.10%	14.04%	0.19%	0.38%	0.28%
District 6	428,096	393,271	30,188	1,433	2,407	798
	100.00%	91.87%	7.05%	0.33%	0.56%	0.19%
District 7	414,413	306,754	71,071	26,489	4,201	5,898
	100.00%	74.02%	17.15%	6.39%	1.01%	1.42%
District 8	403,678	305,366	84,386	8,699	2,956	2,271
	100.00%	75.65%	20.90%	2.15%	0.73%	0.56%
District 9	421,615	380,364	33,849	1,275	5,059	1,069
	100.00%	90.22%	8.03%	0.30%	1.20%	0.25%
District 10	421,456	397,476	20,837	700	1,409	1,036
	100.00%	94.31%	4.94%	0.17%	0.33%	0.25%
District 11	430,457	396,064	27,438	5,126	1,237	592
	100.00%	92.01%	6.37%	1.19%	0.29%	0.14%
District 12	411,687	186,115	219,610	1,529	3,283	1,150
	100.00%	45.21%	53.34%	0.37%	0.80%	0.28%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

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